THE FORMATION OF THE NORTH GERMAN CONFEDERATION.

THE events attending the establishment of the North German Confederation are of exceptional interest to the student of public law because in them he can study the process by which a federal state comes into existence. From 1815 to 1866 there were in Germany nearly forty sovereign states, united in a league similar to that which existed in this country just previous to 1789. The most formidable obstacle in the way of national unity was the rivalry between the two most powerful states of the confederation. After Sadowa and the consequent exclusion of Austria from Germany, the twenty-two states north of the Main formed under the leadership of Prussia the North German Confederation, — a change similar to that by which in this country a league of thirteen states was transformed into a federal state. Even in the process by which the transformation in Germany was effected there are many points of resemblance to the American instance.

I.

Before examining the nature of this transformation, its history must be briefly studied. On the 14th of June, 1866, the Diet having decreed mobilization against Prussia, the Prussian envoy announced the withdrawal of that state from the confederation. Already on the 10th of June, when the crisis appeared imminent, Bismarck had addressed a circular dispatch to the Prussian envoys at all the German courts, except the Austrian, in which he had inquired whether in case of the anticipated dissolution of existing relations the governments would be disposed to form a new confederation upon a different basis. The outlines of the proposed constitution which this dispatch contained have been appropriately called the first draft of the constitution of the North German Confederation. A favorable

issue of the negotiations which were thus inaugurated was assured by the victory won by Prussia at Sadowa on the 3d of July, followed on the 26th of the same month by the preliminaries of Nicolsburg, and on the 23d of August by the treaty of Prague. The terms agreed upon cleared the field for the work of political reorganization by the withdrawal of Austria, and limited it to the region north of the Main.

Five days before the conclusion of the treaty of Prague, what is known as the August treaty was signed in Berlin on the basis of a draft which Bismarck had as early as the 4th of August laid before all the states of North Germany, with the exception of those that were marked for incorporation in the Prussian monarchy. The sixteen states that signed this treaty on August 18th were shortly afterwards joined by the remaining states north of the Main. Without prejudging the case, but merely to show the part which this treaty plays in the discussion, Laband's remark may be quoted, that "the treaty of the 18th of August, 1866, forms the international foundation for the erection of the North German Confederation." Seydel, as we shall see, holds the North German Confederation and the empire to be an international relation of which this treaty is the only foundation. The treaty was to hold for one year unless earlier terminated by fulfilment. Before this period should elapse the international relation formed by the treaty was to be converted into a constitutional relation on the basis of the Prussian draft of the 10th of June. The constitution was to be formed by the governments in agreement with a Reichstag, chosen according to the electoral law of the 12th of April, 1849. It was a fortunate circumstance, as Karl Binding has recently pointed out, that this law, destitute though it was of legal validity, and yet expressing the views of German liberals as to the conditions of popular representation, enabled the governments to avail themselves of the co-operation of a national Reichstag;[1] whereas in America the particularistic origin of the Philadelphia Convention gave support to the opinion that the Union was created by the states.

The first thing to be done by the governments in carrying

[1] Karl Binding, Die Gründung des Norddeutschen Bundes, p. 21.

out the terms of the August treaty was to make provision for the election of the Reichstag. To this as the first step Bismarck had from the beginning attached the greatest importance; for without the necessity of agreement which was thus brought home to the governments, their deliberations might have been interminable and fruitless. Accordingly, in the several states electoral laws were enacted, differing in only unimportant respects from the law of the 12th of April, 1849. The election of members of the constituent Reichstag under state law is such an anomalous proceeding that Binding sees in it a deviation from the stipulations of the August treaty, which, as he thinks, made it incumbent on the governments to provide for the holding of the elections under the law of 1849 without recourse to state legislation. But this raises the question which will be discussed further on, whether the form which the national co-operation assumed has juristic importance. The Philadelphia Convention, though made up of state delegations casting the vote of their states, nevertheless established a national government. An amendment made to the electoral law by the Prussian Landtag required that the constitution should be submitted for its approval; an example which was followed in most of the other states.

The necessary steps having been taken for the election of the Reichstag, the envoys of the governments convened at Berlin on the 15th of December to consider the draft of a constitution laid before it on that day by Count Bismarck. Three formal sessions, held on the 18th and the 28th of January and on the 7th of February, show how much must have been done beforehand in the way of private conference and exchange of views between the envoys and their governments. In the session of the 18th of January the crown of Prussia was authorized to represent the associated governments in their relations with the Reichstag, a function assigned to the King of Prussia in the proposed constitution. Accordingly, the work of the envoys now only awaiting the ratification of their governments, the King, by a patent of the 12th of February, 1867, the day following the general elections, summoned the Reichstag to meet in Berlin on

the 24th of February, and on that day he laid before it in the name of the associated governments the draft of the constitution which they had adopted.

Immediately upon the close of the deliberations of the Reichstag, which covered a period of two months, the constitution as amended was adopted by the assembly of envoys, whereupon it was submitted by the governments to the legislatures of their several states and approved by the latter in the form prescribed for constitutional amendments in each state. The constitution thus adopted should have been promulgated either by the associated governments or by the governments and the Reichstag jointly. It was, as Binding points out, an anomaly that a national constitution should be promulgated by state governments. Strangely, however, neither the manner of promulgation nor the question when the new constitution should go into effect, had received any attention from what we may be justified in calling the new federal authorities. This omission was supplied by the state governments which promulgated the constitution, through the insertion of an identical provision that on the 1st of July, 1867, it should go into effect in the promulgating state. Ratification by state legislatures and promulgation on state authority are facts to which Seydel appeals as proof that the constitution is not a federal law but an identical law of the several states. Binding holds that the state patents issued by the state governments are incorrect in form, but that in principle they rest on the authority of the associated governments and of the Reichstag.

II.

This sketch of the history of the establishment of the North German Confederation prepares the way for an examination of the theories which in Germany the facts have been made to support. Among them the American student will at once recognize old acquaintances in a new garb. Seydel is a disciple of Calhoun, whose principles he applies to the German Empire. It was the merit of Calhoun, — a merit which makes his writings invaluable to the student of public law, — that

starting from premises that were generally accepted he deduced from them with inexorable logic their ultimate consequences, and left no other choice open than the abandonment of the premises or the acceptance of his conclusions. Like Calhoun, Seydel holds that the doctrine of a division of sovereignty is in contradiction with the nature of the state. Sovereignty being indivisible and the states sovereign, it follows that the empire is not a state at all, but is only an international relation between sovereign states. These states concluded the August treaty for the joint regulation of common interests; and the constitution is hence an identical law of the several states, enacted in order to give effect on state authority to the stipulations of the treaty. The contents of the treaty and of the constitution are identical, the object of the latter being to enforce within state limits the provisions of the international agreement.

These arguments are of value because of the light they throw upon the origin of a federal state. Starting from the premise, at that time generally admitted, that the federal government had been formed by the states, Calhoun convincingly showed that the Union can be nothing more than a league of states, and that its executive, legislature and judiciary are organs, not of a federal state, but of the confederated states. Seydel, following Calhoun, holds that the empire is not a state, because it is founded upon treaties. Admit the premise and the conclusion follows irresistibly; for a treaty, which is an agreement between sovereign states, cannot be a fundamental law binding alike the people and the states. Every treaty presupposes the equality of the contracting parties, and the obligations which it creates are assumed, not imposed. No sovereign state, however powerful, can give law to another sovereign state, however slender the latter's resources. It lies in the nature of sovereignty that no obligation can be imposed upon it by any earthly power. Whatever obligations rest upon it are assumed, and derive their binding force not from the will of another but from its own will. If the constitution is not a law imposed on the states by an authority having the right to command their obedience, then it rests upon their joint will, and a violation of its

provisions on their part is nothing more than a breach of the contract into which they have entered.

Moreover, treaty, inasmuch as it is the form which international relations necessarily take, must always remain treaty, and cannot be transmuted into fundamental law. States cannot divest themselves of their sovereignty in behalf of a state of their own creation. The view that has found large acceptance in America, that the states created the Union by bestowing upon it certain of their powers while retaining the rest, converts a federal state into a mere aggregate of the states that compose it, and its will into the joint will of its members. All relations between states must be on the basis of treaty. Thirteen states may reach an agreement, but after the agreement they are still thirteen. It is impossible in this way to pass from the coexistence of thirteen to one. Thirteen wills cannot concur to form a will which shall not be their joint will, but a new will imposing upon them its authority. The example of artificial persons from the domain of private law is not to the point; for it is the law of the state which establishes corporations and clothes them with whatever powers they possess. Binding points out that a treaty effects, not a union of two wills, but an agreement between them, and that the wills of the contracting parties have different contents and are directed toward different subjects, the obligations assumed by one being an equivalent for those assumed by the other.

Neither the August treaty nor the treaties concluded at Versailles in November of 1870 between the states south of the Main and the North German Confederation are in conflict with this view. By the former, the states agreed upon a method of calling into existence the organs of the nation which in organizing itself as a state was to subject them to its sway. To the authorities that were in sole possession of the field naturally fell the initiative in the work of political reorganization; but to hold that the states founded the North German Confederation is to overlook the nation of which that confederation was but the political organization. Of the treaties concluded at Versailles that with Bavaria has most interest, because of the

weighty concessions made to that state in order to secure its entrance into the confederation. Article II contained the constitution amended so as to make it acceptable to Bavaria. The adoption of the proposed amendments by Federal Council and Reichstag took the form of ratification of the treaty. But this irregularity in form does not change the fact that the North German Confederation revised its constitution upon its own authority. Otherwise the constitution as contained in the treaties or appended to them, and the constitution after the redaction which was shortly undertaken by Federal Council and Reichstag to perfect its form, would rest upon different foundations. Not only, however, was the constitution not formed by treaty, but the entrance of the states into the confederation in fulfilment of the treaties was not in strictness state action at all, but rather the acceptance of the authority of the confederation by a people who had outgrown state limitations and who felt themselves to be part of the German nation.

There can therefore be nothing in common between what is a form of state action and what must lie outside of the sphere of state action, between a treaty by which a state enters into relation with other states and the process by which a nation, which is something altogether different from the aggregate of the state populations, organizes itself as a state. Decay and growth go on side by side in political society as elsewhere. Old institutions disappear or are transformed, and new forms are evolved to meet new needs and conditions. A state in this way undergoes constant renovation and improvement. But it is a much more serious matter when the state itself becomes antiquated and loses its hold on the allegiance of its subjects. History furnishes a good many examples of this alienation. By the middle of the century, both in Italy and in Germany, the populations of the states had already been fused into a nation. In such a case the form survives after the spirit has departed. How can we hold that a federal state is created by states which have already been undermined by forces working from beneath, unless indeed we believe that their power to create increases in proportion to their decline? The new polit-

ical system must be created by the forces that have undermined the old. When we speak of the entrance of the states into the German Confederation or the American Union, we give an erroneous impression by using words which do not correctly describe what took place. It was natural that such terms should be employed, especially at a time when the nature of the change was not as fully understood as it has come to be since. Moreover, nothing is more common than to retain accustomed forms of expression while attaching to them new meaning. The German Confederation was a league, but the North German Confederation which succeeded it was a state. This latter confederation was not formed by the entrance into it of a number of states. The sources of its authority lie deeper than the states: they must be sought in that upheaval by which a nation was formed and, when formed, gave itself political organization. That a number of states, themselves undermined, should create an authority which, in issuing from their hands, subjects them to its sway, is a thing as impossible as the squaring of a circle.

The contract theory of the origin of the state, which found general acceptance throughout the last century, has since then been entirely discredited. As a political being man is born a member of political society and subject to its authority. The compact made upon the *Mayflower* might determine the form of organization, but could not bring into existence a political society which was already there, and which as such had jurisdiction over its members. The state is the necessary result of social relations and forces. To derive its authority from the consent of its members is to legalize anarchy. Public opinion is not the mere sum of individual judgments, but rather the result of an organic process, in the course of which individual views endlessly modify one another. Society brings into existence new forces and relations, and hence is not the mere aggregate of its members. In like manner the state, with its forces and functions, its natural superiorities and inferiorities, is not a simple sum in addition. Why should we be willing to admit this proposition when applied to England or France, and then

deny it when applied to the United States or the German Empire? How can we accord to states the power to call a state into existence, when we deny the power to individuals? Why should a compact work more effectually in the one case than in the other? In truth it has no such working. It can bring into existence a league whose will is the will of its members of which it is itself the aggregate. But a state owes its birth to great historical forces which undermine the existing order and effect a political reorganization.

In his well-known work on the public law of the German Empire,[1] Laband holds, in opposition to Seydel, that the empire is not a league but a state, and moreover, since sovereignty is indivisible, that the empire alone is sovereign. As a state it cannot rest on a treaty, for a treaty creates only international rights and obligations. The parties to the August treaty "do not found a confederation, but pledge themselves to found a confederation; they agree not on a constitution, but on a method by which a constitution is to be established." Hence the North German Confederation did not come into existence on the 18th of August, 1866, but on the 1st of July, 1867, when it was founded by the states in fulfilment of treaty stipulations.

In considering these views the question at once arises: What is gained by denying that the August treaty was the foundation of the confederation, and then asserting that the confederation was founded by the states in fulfilment of that treaty? The distinction between a treaty and an act done in fulfilment of a treaty is of no value unless the act is to be performed within the jurisdiction of the state. In that case it is an act of sovereignty; but authority can be exercised outside of state limits only with the consent of the states interested. Since a state is a sovereign only within its own boundaries, state action beyond state limits must necessarily be upon the basis of treaty. The reason why a state cannot rest upon treaty is that a treaty is the form taken by international co-operation. But if a state co-operates with other states to form a federal state, what is this but international co-operation and the exercise of state authority

[1] Laband, Das Staatsrecht des Deutschen Reiches.

beyond state boundaries? Seydel's position here is incontrovertible. Holding that acts of the empire are acts done in fulfilment of treaty, he infers that they rest ultimately on state authority. The founding of the empire was no doubt an act, but it was an act performed outside of the existing order and hence revolutionary in its character. An act subverting the existing political order cannot be an act of the states, for they are the political order that is to be overturned. Along this road it is impossible to get beyond a league of sovereign states; and indeed the empire, as Laband constructs it, is a corporation of states whose subjects owe allegiance to the empire only through the states, which alone are its members. This is Calhoun's doctrine of federal citizenship through state mediation.

From what has been said it is evident that Laband seeks to establish legal continuity between the old order and the new. While denying that the August treaty is the legal foundation of the North German Confederation, he yet holds that it is its international foundation. In the proceedings of governments and Reichstag he sees nothing but the steps taken by the states in fulfilment of treaty to draw up a constitution. The states are preparing to found such a federal state as the constitution describes; but until they actually call it into existence and endow it with its fundamental law, the constitution has no more authority than have the resolutions of a public meeting. In harmony with this line of thought is Laband's assertion that by their ratifications the legislatures empowered the governments to proceed to the establishment of the North German Confederation with the constitution which had been drawn up. The act by which the states founded the confederation Laband characterizes as a *Rechtshandlung*, or an act founded in law, although it is difficult to see how an act performed beyond state limits can derive its qualification as legal from state legislation.

All attempts to find a juristic explanation of the origin of a state are doomed to failure; for the birth of a state, however peaceably it makes its advent, is a revolution. To Jellinek belongs the credit of having shown that this is as true of a federal

state as of a simple state.[1] Since the existing legal order rests on the authority of the state, it cannot be made use of to explain the existence of the state itself. But the states are part of the political order of the federal state, for they have no existence except as its members. They were in possession of the field before it, but the nation in giving itself political organization reduced them to a subordinate position. Jellinek rejects the traditional doctrine of divided sovereignty and logically holds that all the powers of government belong to the federal state, which, however, in assigning some of these powers to the organs which it has in common with every simple state, leaves the rest to the states, now become its members.

The confusion that results from qualifying as legal, proceedings that are revolutionary, is seen in our own history. The establishment of the Union was a work of political reorganization undertaken by a people which had outgrown a system of small commonwealths and had become conscious of nationality. In undertaking this work the nation made use of the means that were at hand, and these were such as the existing political system offered. The Philadelphia Convention was made up of delegates from the states, and the constitution, when adopted, was submitted to the people as then politically organized. But to infer the particularistic character of the constitution from the particularistic character of the organs which the nation necessarily employed in ordaining it, is to confound the river with the channel through which it flows. This is the error into which Laband falls. In the deliberations and decisions of the assembly of envoys and of the Reichstag he sees only the steps taken by the states in fulfilment of treaty, to frame the constitution with which they are to endow the new state when they shall call it into existence. The national character of the Reichstag might have suggested the nation which was making use of both governments and Reichstag in ordaining its constitution. But the governments in taking counsel of the nation were, according to Laband, merely carrying out the August treaty.

[1] Jellinek, Staatenverbindungen.

In what Laband regards as the mere fulfilment of treaty, Binding sees the emergence of a new authority.[1] The formation of the North German Confederation must, he declares, be *extra et supra legem.* The proceedings of the governments and the Reichstag are a creative process by which the elements that are to form the new state co-operate in ordaining new legal relations. But in ordaining the constitution the assembly of envoys and the Reichstag did not act as organs of the North German Confederation, for that was not founded until the 1st of the following July. Much less did they act as organs of the states, for a federal constitution cannot be state legislation. It was their moral weight in Germany which qualified them to create a new system of public law. In ratifying a constitution which was to modify on its own authority the law of the states, the state legislatures relinquished rights which they had in the existing political order. But although the constitution was already law, it had not yet gone into effect. When the governments and people, upon the appointed day, took the positions assigned them in the new system, they gave effect to the constitution, and in so doing they created the North German Confederation.

For the new political order Binding finds a commanding authority, but that authority is not, as in Jellinek, the state itself. This inversion of the logical relation between a state and its constitution is not without serious consequences, for Binding finds himself compelled to make to Seydel the admission that a constitution may be a compact. Indeed, he expresses the opinion that in case of absolute monarchies, where the consent of the people would not be necessary, a federal state may be formed by treaty. But where states with constitutional governments undertake to form a federal state the consent of the nation is necessary, and a treaty between states which should require the ratification of the entire nation is unthinkable. But does not this remark suggest where the real difficulty lies? Is it conceivable that the parties co-operating in the formation of a constitution should act in different capacities, the Reichstag

[1] In the suggestive pamphlet already mentioned.

in behalf of the nation and the governments in behalf of the states? Are they not both organs of a state which is already moving and which gives its first sign of life in ordaining its constitution? If this be true, then what Binding calls agreement or compact between the governments and the Reichstag is no more compact than is a vote of the German Federal Council or the concurrent vote of Federal Council and Reichstag. It is not an agreement between the parties that are to form the new state, but co-operation between the organs which the new state makes use of in ordaining its fundamental law.

Agreement then must be between the organs which a nation employs and not between individuals or states; for the nation is not a numerical aggregate but the result of an organic process. In Germany national forces had been gradually gathering strength until at last they became irresistible. By breaking down state barriers for economic purposes the Customs Union had demonstrated the advantages of national unity. Dangers from abroad showed the necessity of the concentration of Germany's military resources. The increasing intercourse between the states pleaded for unification of the law and for a uniform judicial administration. Into this national movement both people and governments were drawn, the latter for the most part reluctantly and out of deference to public opinion and fear of Prussia. But whether spontaneously or under pressure, they espoused the cause of the nation, hoping to find in the position they gained on the national arena compensation for the diminution of power at home. The Prussian government had long stood forth as the champion of German interests, and the position that was accorded to it in the new system was a reward for services rendered to the national cause. In the nation which had outgrown the system of small states and was bent on establishing national institutions it was the natural leader, and its ascendency assured the co-operation of the other governments. What could be more natural than that associated governments and Reichstag should alike serve as organs of the nation, now that it was undertaking the work of political reorganization? As in local affairs the governments were the leaders, so the

associated governments took the lead in national affairs; and as in the states the governments enjoyed the co-operation of legislatures, so on the national arena the associated governments summoned to their co-operation a North German Reichstag. In summoning this Reichstag and drawing up a constitution for its approval, they were no less organs of the nation than was the body which they summoned. The new authorities are already pointed out before the work begins, and they fall naturally into the positions that seem by right to belong to them. The organs which the nation uses in establishing its constitution and which, as Jellinek remarks, serve as a provisional government, usually differ in character from those which the constitution provides. Such was the case in this country, where the nation had to make use of a convention made up of delegations from the states. But in Germany the forms of provisional and of permanent organization are almost identical. Federal Council, Reichstag and King of Prussia already take the positions which they occupy to this day.

This close resemblance between the provisional and permanent form of organization is in a high degree instructive. It may be difficult to see in the Philadelphia Convention an organ of the American nation, but there is no such difficulty in the case before us. Associated governments and Reichstag were peculiarly fitted to serve as organs of the nation, and indeed they have served in that capacity ever since. But if they were organs of the nation, they were as such organs of the state; for what is the state but the nation politically organized? Already in its provisional organization the state is emerging into the light and speaking with authoritative voice. In taking political form and organization the nation becomes the state, and even the acts by which it establishes its permanent organization rest on state authority. Otherwise whence do they derive their sanction? An understanding between the governments is a treaty between sovereign states. The discussions of the Reichstag except as organ of a state in process of formation have no more authority than the resolutions of a public meeting. Governments and Reichstag could ordain a constitution only as organs of the

nation; but if they formulate the will of the nation, the state is already in existence, although but provisionally organized. For the criterion by which to judge of the presence of the state is not the form of its organization, whether provisional or permanent, but the existence of a political authority. The wish of the nation, hitherto fruitlessly expressed, has been transformed into the will of the state. This will is already law, although as yet it has not gone into effect. The authority of the states remains still undiminished. But to their sway a term has been set. Already they are falling under the shadow of a greater state, which is the embodiment of national forces and which makes use of them in effecting its organization and assigns them permanent places in its political system.

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